

STATE OF MICHIGAN
COURT OF APPEALS

DAVID VERTIGAN,

Plaintiff-Appellant,

v

S.A. TORELLO, INC.,

Defendant-Appellee,

and

CITY OF PORT HURON,

Defendant.

UNPUBLISHED

March 27, 2003

No. 238077

St. Clair Circuit Court

LC No. 01-001764-CZ

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order that granted summary disposition to defendant S. A. Torello, Inc., on the basis that the statute of limitations had expired. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was the owner of a restaurant and bar known as D.J.'s Rustic Inn in Port Huron. In November 1995, the wood-frame portion of the building was destroyed by fire. Left standing, however, was an attached cement block garage which contained a walk-in cooler and other personal property. A dispute ensued between plaintiff and his insurer, which left the property in a dangerous state of disrepair for many months. After plaintiff failed to heed several warnings by the city to clear the site, the city issued, on April 3, 1996, an emergency order for abatement by demolition, declaring "the building located at 2203 Railroad Street" to constitute a public nuisance and ordering "immediate demolition." The city solicited bids to demolish the structure. The contract was awarded to defendant S. A. Torello, Inc., which proceeded to demolish and clear the site, including the garage and its contents, sometime between April 5 and 11, 1996.

Plaintiff filed his first complaint against the city and Torello on May 3, 2000. The complaint alleged negligence, breach of contract against Torello, and a takings claim against the city. Defendants moved for summary disposition, which was granted by the trial court "without prejudice" to allow plaintiff to pursue any valid theory of liability with respect to the loss of his personal property.

On June 27, 2001, plaintiff filed the present complaint, alleging new theories of liability against Torello, including conversion, statutory conversion, and replevin. Plaintiff's complaint also alleged a claim of respondeat superior against the city. Plaintiff asserted that the fire had not destroyed the garage and that Torello improperly converted its contents—including the walk-in cooler and various tools and equipment—during the demolition.

Torello moved for summary disposition on grounds that the complaint was barred by res judicata, compulsory joinder, and expiration of the applicable statutes of limitations. Torello argued that the three-year statute of limitations under MCL 600.5805(9)—governing claims for injury to property—barred plaintiff's conversion claims. The trial court agreed, rejecting plaintiff's argument that the conversion claims were subject to the six-year limitations period under MCL 600.5813. The court noted that Torello's motion had also raised issues of res judicata and compulsory joinder, but did not reach those issues in light of its ruling that the claims were barred by the applicable statute of limitation. Thereafter, the trial court granted plaintiff's motion for reconsideration, but then reaffirmed its decision.

On appeal, plaintiff argues that the trial court erred in applying the three-year statute of limitations under MCL 600.5805(9),¹ which applies to claims for injury to property or persons, rather than the six-year statute of limitations under MCL 600.5813,² which is a catch-all provision that applies to all other personal actions. We agree.

Plaintiff alleged conversion of his personal property, i.e., the contents of the garage, including the walk-in cooler, tools, and equipment. Conversion is defined as “any distinct act of dominion wrongfully exerted over another's personal property, and occurs at the point that such wrongful dominion is asserted. *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960). Conversion of personal property or chattel has historically been held to be subject to the six-year statute of limitation under MCL 600.5813. See, e.g., *Thoma, supra* (conversion of automobile); *Davidson v Bugbee*, 227 Mich App 264; 575 NW2d 574 (1997) (conversion of farm equipment); *Drapefair, Inc v Beitner*, 89 Mich App 531; 280 NW2d 585 (1979) (conversion of worker's compensation settlement proceeds); *Miller v Green*, 37 Mich App 132; 194 NW2d 491 (1971) (conversion of farm animals); *Chrysler Corp v Bunnell Chrysler Dodge, Inc*, 620 F Supp 1265, 1266-1267 (ED, Mich, 1985) (conversion of automobiles). See also *Hart v Detroit*, 416 Mich 488, 501-504; 331 NW2d 438 (1982) (in the context of an inverse condemnation claim, analyzing the distinction between a claim for conversion and a claim for

¹ MCL 600.5805(9) provides:

(9) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

² MCL 600.5813 provides:

All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

injury to property for purposes of determining the applicable statute of limitation). An established exception to this general rule applies to conversion claims arising in the context of the uniform commercial code, those claims being subject to the three-year statute of limitation for injury to property. See, e.g., *Continental Casualty Co v Huron Valley Nat'l Bank*, 85 Mich App 319; 271 NW2d 218 (1978); *Brennan v Edward D Jones & Co*, 245 Mich App 156; 626 NW2d 917 (2001).

Accordingly, because plaintiff's claims here alleged conversion of personal property not subject to the UCC, the six-year statute of limitation under MCL 600.5813 was applicable. The trial court erred in ruling otherwise.

Seeking affirmance of the trial court's grant of summary disposition on alternative grounds, defendant Torello argues on appeal that plaintiff's complaint was barred by res judicata or compulsory joinder pursuant to MCR 2.203(A).³ We disagree.

"The doctrine of res judicata is a manifestation of the recognition that interminable litigation leads to vexation, confusion, and chaos for the litigants, resulting in the inefficient use of judicial time." *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Three prerequisites must be met for application of res judicata: (1) the prior action must have been decided on its merits; (2) the issues raised in the second case were or could have been resolved in the first; and (3) both suits must have involved the same parties or their privies. *Ozark v Kais*, 184 Mich App 302, 307-308; 457 NW2d 145 (1990).

Here, defendant Torello was granted summary disposition of plaintiff's negligence claim in the first lawsuit on grounds that the three-year statute of limitation had expired. The trial court expressly designated the dismissal as "without prejudice" to allow plaintiff to determine whether he could assert another valid theory of liability with regard to his claim that defendant misappropriated his personal property in the garage. Under these circumstances, plaintiff's subsequent complaint alleging conversion against defendant Torello was not barred by res judicata because a grant of summary disposition on grounds that the statute of limitation has expired does not constitute an adjudication on the merits of a cause of action. *Rogers v Colonial Fed Savings & Loan Assoc*, 405 Mich 607, 619 n 5; 275 NW2d 499 (1979); *Nordman v Earle Equipment Co*, 352 Mich 342, 346; 89 NW2d 594 (1958); *Ozark*, *supra* at 308. Instead, such a dismissal is construed as being "on a technical, procedural ground," which does not implicate the underlying purpose of the doctrine of res judicata, i.e., to avoid the relitigation of claims. *Id.* The trial court's designation of the dismissal as "without prejudice" reinforces this conclusion. Accordingly, because defendant Torello has failed to demonstrate that plaintiff's initial complaint was adjudicated on its merits, res judicata does not bar plaintiff's present complaint.

³ It is well settled that an appellee who does not file a cross appeal cannot obtain a decision *more favorable* than was rendered by the lower court, but may still urge affirmance on alternative grounds of the lower court's favorable judgment. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *Burns v Rodman*, 342 Mich 410, 414; 70 NW2d 793 (1955). Here, defendant does not seek to obtain a decision from this Court more favorable than that issued by the trial court, but rather seeks affirmance on grounds of res judicata and/or compulsory joinder, issues raised by defendant in its motion for summary disposition below.

Reversed and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage